

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

JASON DEVERS,

Petitioner,

vs.

STATE OF NEBRASKA;

Respondent.

**8:23CV188**

**MEMORANDUM AND ORDER**

This matter is before the court on preliminary review of Petitioner Jason Dever's Petition for Writ of Habeas Corpus, [Filing No. 1](#), brought pursuant to [28 U.S.C. § 2254](#). Also before the Court is Petitioner's Motion for Issuance of Show Cause Order, [Filing No. 4](#). The purpose of this review is to determine whether Petitioner's claims, when liberally construed, are potentially cognizable in federal court. Condensed and summarized for clarity, Petitioner's claims are:

Claim One: Petitioner's right to due process was violated because the state district court and Nebraska Supreme Court failed to hold an evidentiary hearing in his state postconviction proceeding and failed to adjudicate Petitioner's ineffective assistance of counsel claims.

Claim Two: The state district court and Nebraska Supreme Court violated Petitioner's right to due process because the judgment denying Petitioner's state postconviction petition was not final for purposes of appellate review.

Claim Three: Petitioner was denied the effective assistance of appellate counsel because appellate counsel failed to assert that trial counsel was ineffective.

Claims One and Two are not cognizable in a federal habeas action because they are based on errors in Petitioner's state postconviction proceedings. Errors during state postconviction review are not cognizable in a federal habeas corpus action. See *Bell-Bey v. Roper*, 499 F.3d 752, 756 (8th Cir. 2007) ("Because the Constitution does not guarantee the existence of state post-conviction proceedings, an infirmity in a state post-conviction proceeding does not raise a constitutional issue cognizable in a federal habeas application." (cleaned up)); *Jenkins v. Houston*, 4:05CV3099, 2006 WL 126632 (D. Neb. 2006) (collecting cases). **Claims One and Two are dismissed.**

Claim Three, when liberally construed, is potentially cognizable in federal court. However, the Court cautions Petitioner that no determination has been made regarding the merits of this claim or any defenses to them or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

Petitioner's Motion for Order to Show Cause requests that the Court enter an order requiring the Government<sup>1</sup> to show cause why the Petition should not be granted. The Motion will be granted, in part, because the Court has reviewed the Petition and has directed Respondent to file a response. The Motion is denied in all remaining respects.

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<sup>1</sup> The Court notes that Petitioner failed to name a proper respondent in the Petition. Rule 2(a) of the *Rules Governing Section 2254 Cases in the United States District Courts* states that "if the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody." In habeas corpus challenges to present physical confinement, the default rule is that the proper respondent is the warden of the facility where the prisoner is being held. *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2005). Because Petitioner's claims are otherwise clear, the Court will allow the Petition to proceed, and Respondent may file a motion to substitute the proper respondent.

IT IS THEREFORE ORDERED that:

1. Upon initial review of the habeas corpus petition, [Filing No. 1](#), the Court preliminarily determines that Petitioner's Claim Three, as set forth in this Memorandum and Order, is potentially cognizable in federal court. **Claims One and Two are dismissed.**

2. By **December 18, 2023**, Respondent must file a motion for summary judgment or state court records in support of an answer. The Clerk of the Court is directed to set a pro se case management deadline in this case using the following text: **December 18, 2023**: deadline for Respondent to file state court records in support of answer or motion for summary judgment.

3. If Respondent elects to file a motion for summary judgment, the following procedures must be followed by Respondent and Petitioner:

- A. The motion for summary judgment must be accompanied by a separate brief, submitted at the time the motion is filed.
- B. The motion for summary judgment must be supported by any state court records that are necessary to support the motion. Those records must be contained in a separate filing entitled: "Designation of State Court Records in Support of Motion for Summary Judgment."
- C. Copies of the motion for summary judgment, the designation, including state court records, and Respondent's brief must be served on Petitioner *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the record that are cited in Respondent's motion and brief. In the event that the

designation of state court records is deemed insufficient by Petitioner or Petitioner needs additional records from the designation, Petitioner may file a motion with the Court requesting additional documents. Such motion must set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

- D. No later than 30 days following the filing of the motion for summary judgment, Petitioner must file and serve a brief in opposition to the motion for summary judgment. Petitioner may not submit other documents unless directed to do so by the Court.
- E. No later than 30 days after Petitioner's brief is filed, Respondent must file and serve a reply brief. In the event that Respondent elects not to file a reply brief, she should inform the Court by filing a notice stating that she will not file a reply brief and that the motion is therefore fully submitted for decision.
- F. If the motion for summary judgment is denied, Respondent must file an answer, a designation and a brief that complies with terms of this order. (See the following paragraph.) The documents must be filed no later than 30 days after the denial of the motion for summary judgment. **Respondent is warned that failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including Petitioner's release.**

4. If Respondent elects to file an answer, the following procedures must be followed by Respondent and Petitioner:

- A. By **December 18, 2023**, Respondent must file all state court records that are relevant to the cognizable claims. See, e.g., Rule 5(c)-(d) of the *Rules Governing Section 2254 Cases in the United States District Courts*. Those records must be contained in a separate filing entitled: “Designation of State Court Records in Support of Answer.”
- B. No later than 30 days after the relevant state court records are filed, Respondent must file an answer. The answer must be accompanied by a separate brief, submitted at the time the answer is filed. Both the answer and the brief must address all matters germane to the case including, but not limited to, the merits of Petitioner’s allegations that have survived initial review, and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. See, e.g., Rules 5(b) and 9 of the *Rules Governing Section 2254 Cases in the United States District Courts*.
- C. Copies of the answer, the designation, and Respondent’s brief must be served on Petitioner at the time they are filed with the Court *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the designated record that are cited in Respondent’s answer and brief. In the event that the designation of

state court records is deemed insufficient by Petitioner or Petitioner needs additional records from the designation, Petitioner may file a motion with the Court requesting additional documents. Such motion must set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

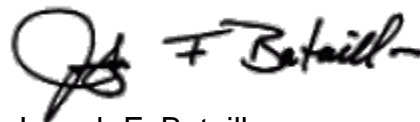
- D. No later than 30 days after Respondent's brief is filed, Petitioner must file and serve a brief in response. Petitioner must not submit any other documents unless directed to do so by the Court.
- E. No later than 30 days after Petitioner's brief is filed, Respondent must file and serve a reply brief. In the event that Respondent elects not to file a reply brief, she should inform the Court by filing a notice stating that she will not file a reply brief and that the merits of the petition are therefore fully submitted for decision.
- F. The Clerk of the Court is directed to set a pro se case management deadline in this case using the following text: **January 12, 2024:** check for Respondent's answer and separate brief.

5. No discovery shall be undertaken without leave of the Court. See Rule 6 of the *Rules Governing Section 2254 Cases in the United States District Courts*.

6. Petitioner's Motion for Issuance of Show Cause Order, [Filing No. 4](#), is granted, in part, consistent with this Memorandum and Order.

Dated this 3rd day of November, 2023.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J F Bataillon". The signature is stylized with a large, circular initial "J" and a long horizontal stroke extending to the right.

Joseph F. Bataillon  
Senior United States District Judge